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Craig Spangenberg

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I

IT WILL be the purpose of this article to discuss the practical aspects of the existing pre-trial procedure in Cuyahoga County from the viewpoint of plaintiff and plaintiff's counsel. At the very outset it should be observed that the success of the pre-trial conference will depend largely on the effort and preparation plaintiff's counsel brings to it.

If pre-trial be viewed merely as a means of settling the lawsuit, it will produce relatively few settlements. If it be viewed as a means for pin-pointing the disputed issues between the parties, and expediting the trial, it will produce a relatively large number of settlements.

The reason for this seeming contradiction lies in the nature of a lawsuit. It is, in its usual form, a dispute between two people as to what happened, the legal effect of what happened and the value in damages of the results of the happening. The dispute centers over a past event, which must be proved to have occurred in a certain way. The nature of the proof does not lend itself to scientific verification. The proof comes through the testimony of parties and witnesses who are burdened with human frailties of inaccurate vision, imperfect and often distorted memory, interest, bias and prejudice, suggestibility, and often an inarticulate inability to recreate the past event in words from the witness chair.

The testimony in turn must be judged as to its probative force and credibility by other humans, likewise affected with the bias and prejudice the events of life produce in all of us, and fitted out with memories not always adequate to the task of recalling all the testimony of a two or three week trial for evaluation and discussion in the jury room.

This is not said in criticism of the jury system — a judge as trier of the fact is not likely to be less affected by the forces of life, less biased, less prejudiced, nor of a higher order of attention or memory. There is the greatest merit in seeking to have a spread of interest among twelve judges of the fact, in the reasonable hope that the bias and prejudice, the likes and dislikes, will tend to cancel out and reflect a fair average of the outlook of the community.

It follows from the above observations that a realistic trial lawyer must concede that there is no absolute truth in a lawsuit. The truth is that which the jury believes. To put it another way, counsel may know

to a moral certainty that a traffic light was red. Yet if he knows from his experienced judgment that the jury will believe it was green, then he must, in evaluating his case, disregard his private belief and accept the fact that the light was green.

The same approach must be made to injuries: they are what the jury will believe them to be.

And the same approach must be made to value; the value of the case is dependent not on the liability and the injury in the abstract, but on the probability of jury action in determining the liability, the injury, and the fair compensation as the jury fixes it by verdict.

Pre-trial can be of great value to trial counsel in reaching his determination as to that probable jury result which will determine his approach to settlement. Certainly by the time of pre-trial he should have deposed the adverse party and committed the known witnesses by means of statements or depositions. Certainly any photographs or maps which will be used at trial should be prepared before pre-trial and brought to pre-trial. Medical examinations and reports, from the inception of the injury to the immediate present, should be readied for the pre-trial. Hospital records can be obtained as easily before pre-trial as afterward, and should be available at the pre-trial conference.

Objection may be raised that this type of preparation is expensive, and the expense can be avoided by settling at pre-trial. The objection overlooks the practical psychology of the situation. Defense counsel and the defendant's insurance company claims adjuster, who customarily attends the pre-trial, are not likely to view with any great concern a badly prepared case, obviously unready for trial. The lack of preparation is a sure indication of overeagerness for settlement, and will result in settlement offers in the lowest range. On the other hand, a case fully and carefully prepared, ready to go to trial on the next day, will be bound to impress the defendant with the serious intent of plaintiff's counsel, will offer a clear and distinct threat of jury action, and will lend considerable support to plaintiff's evaluation of what that action is likely to be.

At pre-trial, then, plaintiff's counsel should review the issues of the case candidly and fairly with the court and opposing counsel, disclosing to a full degree what evidence he has. This does not require the naming of each witness, but it will often be found desirable to read significant passages from the statements of key witnesses. Photographs, maps and other physical exhibits can be marked and stipulated. Medical reports should be exchanged. By "exchanged" we mean just that. Some defense counsel, carrying out the policy of their insurance companies, will not disclose the defense medical examination. In such event they are not entitled, it seems to the writer, to copies of plaintiff's medical reports.

Disclosure should be a two way proposition, both on the facts and on the medical.

After review by plaintiff of his case the skillful pre-trial judge will then develop the defense with defendant's counsel, and plaintiff should be willing to stipulate any facts and exhibits that defendant could otherwise prove at the trial. There is little point in making either side go to full technical proof on any fact that can be proved, even though proof be difficult.

The ultimate and desirable end of such discussion is to focus attention on those issues which are in dispute.

Plaintiff should, at this stage, carefully review his pleadings. Has the negligence been effectively pleaded in light of the facts disclosed in preparation as compared with the hopeful clairvoyance exercised when the petition was drawn?

Does the proof of negligence require pleading of ordinances, or of business custom and usage not contemplated when the suit was filed? Are the injuries properly described? Is the prayer a reasonable one? It may serve the plaintiff well to reduce his prayer from $100,000.00 to $15,000.00, say, at pre-trial so that the demand bears some reasonable relation to the injury, wage loss and medical expense which actually developed.

Pre-trial is the time, also, to check the file for depositions which may have been taken for discovery, but have to be used at trial by reason of illness, death, or removal of the witness. The clerk's office should be checked to see that the depositions are duly filed.

It will be apparent that an effective approach to pre-trial requires almost the same work that is involved in final preparation for trial, and requires considerable labor and diligence from the pre-trial judge. Most of our judges will give us this kind of work at pre-trial. An occasional judge will view pre-trial as solely a settlement meeting, starting the conference with the question, "Well, how far are you apart?," and continuing with some pressure to split the difference. The approach to such a judge, shown by experience to meet with some success, is to assure him the case cannot be settled, and press on to stipulate exhibits and facts to expedite the trial. After the case is readied for trial to the best extent possible it can then, usually, be settled on a more reasonable basis than splitting the difference between demand and offer.

There are very great advantages to pre-trial, from a practical standpoint, not readily apparent from the text book outline of pre-trial procedures. As noted above, preparation for pre-trial consumes almost as much effort as preparation for trial. The effort is not wasted, however, since it would have to be done in any event if the case were called for

trial without the intervening pre-trial procedure. But trial calls in Cuyahoga County are uncertain as to time. The case will move from the Trial Call List to a courtroom as that room opens. In practical operation this means that a case tenth on the Trial List may move into a room in an hour or two, or at other times a case at the top of the list may wait three or four days for a room to open. This means witnesses must be subpoenaed and held available, and parties must wait in the office, sometimes as long as a week while waiting for a courtroom to open. Pre-trial calls, on the other hand, are for a day and hour certain, require no attendance of witnesses, and waste none of the time of the parties or counsel.

Another practical point should be noted. If the case is settled in the trial room, there is considerable waste motion and time. It takes time for the counsel and parties to assemble, and after settlement is reached considerable time is lost before the next case is actually called and the parties and counsel for that case convene at the courtroom. Furthermore, an adequate number of jurors to service all the active courtrooms must be maintained, so that a large number of settlements in the trial room means that a large, idle reserve of jurors will be kept in the bullpen to their displeasure and to the county's expense.

Ideally, every case that can be settled should be settled at pre-trial. Every trial room would then work full time at trials, and the scheduling of cases and jurors would be greatly simplified. This ideal state cannot be attained, but let use close with one practical suggestion to the court:

The one great factor that produces settlement is the threat of immediate jury trial. The hard fact that if the parties do not resolve their dispute the jury will, compels the lawyer to stop his dreaming, his wishful thinking, his hopes that somehow, sometime, the facts will change from what they are. The nearer the trial date, the more realistic the lawyer becomes.

Pre-trials should be scheduled by the court in relation to the running of the trial docket. If the attorneys know that trial will be had two or three weeks after pre-trial, it has been our observation that a very high percentage of cases will be settled — on the order of 90 per cent. If the pre-trial docket runs ahead, and the trial docket lags, so that actual trial will not occur until three months or more after pre-trial, then a much lower percentage of cases will be settled at pre-trial, although many of these cases will later be settled in the trial room with considerable waste of efficiency.

In summary, pre-trial is an effective, efficient, desirable procedure to expedite the actual trial of the case by means of stipulation of facts and exhibits and pinpointing of issues. If used primarily to prepare for and

expedite the trial, it will as a by-product produce settlement in the great majority of cases.

It is most effective when held within a few weeks prior to actual trial call of the case, and this time relationship should be closely observed by the court in scheduling its pre-trial calls. The greater the disclosure of their files, their preparation, their case that counsel will undertake to make, the more effective the pre-trial procedure will be. Pre-trial is, in this sense, a useful substitute for the broad federal rules of discovery which have traditionally produced a very high percentage of settlements in the federal civil docket. With full disclosure in pre-trial it is to be hoped that experienced and able counsel can adjust the dispute between the parties as fairly, and as intelligently, as will the twelve jurors, if the matter be laid before them.

II

Leslie R. Ulrich

The statement that our present day manner of life is a breeder of disputes and litigation is not open to serious challenge. As our way of life becomes more complex, the trend in this direction becomes more pronounced, and litigation increases at a rate which far exceeds that which might normally be expected from an increase in population alone.

Our judicial system, designed for a more leisurely pace, has not kept abreast of the increasing demands which have been placed upon it. True, many reforms and improvements have been initiated and adopted over the years, but the courts are still faced with a tremendous task in attempting to keep reasonably current in the disposition of pending matters.

It is estimated that negligence cases account for approximately ninety percent of all civil jury issues in metropolitan areas. It is in this field that the layman has the majority of his contacts with the courts, and it is in this field that the delays and expenses of litigation cause the most dissatisfaction.

Our judicial process is wholly unsuited to the large volume of negligence cases thus being filed. Present methods require approximately three days trial time for the simplest case. It is a time consuming, expensive means of dealing with a mass of run-of-the-mill litigation.

Public unrest with the administration of justice has resulted in numerous suggestions for the alleviation of the problem. These suggestions range all the way from establishing administrative bureaus to handle the negligence case load to discarding completely the time honored system of assessing blame on a legal basis and compensating the injured without reference to the principles of legal liability.

Unless something is done to challenge the problem effectively, the system of common law courts and judges as we know them, and our way of life under an orderly system of law, stand in danger. The bench and bar must meet the problem squarely and must find the solution with the means now available, or have some other system substituted in whole or in part for the one now being administered.

In some sections of our country the courts and lawyers have given up in despair, having apparently come to the conclusion that there is nothing that can be done about the situation. In other sections of our country notable success is being achieved by the use of an *effective* pre-trial system.

In 1938 a committee of the American Bar Association reported:

> Perhaps none of the new developments has greater potentialities for serving the public good than has the plan of a pre-trial hearing of each case by the court.

No legislation is needed for the use of pre-trial. Any court may use the pre-trial conference on its own initiative and at any time. It is merely an exercise by the court of its inherent power to control its own work. None the less, statutes covering the use of pre-trial have been passed in some states and most courts which use the system have adopted rules of court which govern the conference. Pre-trial, permissive but not mandatory, is now in use in most federal district courts. Its use is becoming more prevalent in state courts.

The Common Pleas Court of Cuyahoga County has long had a rule of court providing for pre-trial hearings. Unfortunately, however, no effective use was made of the pre-trial conference system by that court until 1953. It is interesting to note that the systematic use of the pre-trial conference has been used very successfully in the adjoining state of Michigan ever since 1929, having been introduced by Judge Ira W. Jayne of the Wayne County Circuit Court, Detroit. Judges from other states came to Michigan to study the procedure, and the use of pre-trial spread to other jurisdictions. It is indeed strange that it took so long for systematic pre-trial to gain recognition in Ohio.

The use of pre-trial as an effective means of simplifying and shortening litigation and of obtaining amicable settlements has been demonstrated during the past two years by its use in the Cuyahoga County Common Pleas Court. The procedure there employed has met with the almost universal approval of those having daily contact with it. Statistics published by the court, and covering the period of its use, compared with statistics for similar periods prior to pre-trial, clearly establish its value as a means of helping the court keep abreast of an ever-increasing case load. It has removed many of the customary but frequently unnecessary

incidents of a trial which so often have been irritating to witnesses, jurors, litigants and laymen generally. It has unquestionably contributed to a far better administration of justice.

Why is this so? Lawyers on opposite sides of a case always have been free to confer prior to trial in an attempt to simplify the issues later to be tried and to discuss possible settlement, but they rarely have done so. Judges always have had the power to compel lawyers to meet in conference and to try to reach a similar result, but in the absence of a court rule they rarely have done so.

The reason probably lies in the ingrained conservatism of the profession which resists change, and the traditional attitude of lawyers that to approach one's opponent on any feature of a case is to indicate weakness in one's own case. This attitude of dealing at arm's length largely, if not completely, disappears in the informal atmosphere of the pre-trial conference.

There is no mystery surrounding pre-trial. The essential features of the successful pre-trial conference are set forth in Rule 16 of the Federal Rules of Civil Procedure. They are:

1. The simplifications of the issues,
2. The necessity or desirability of amendments to pleadings,
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof,
4. The limitation of the number of expert witnesses,
5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury,
6. Such other matters as may aid in the disposition of the action.

Under the last mentioned item arises the opportunity of the pre-trial judge to use his good offices as a friendly, impartial intermediary in an attempt to reach an amicable disposition of the case without trial.

The fundamental problem in any pre-trial conference is first to ascertain what issues must be tried, and for that purpose to determine whether or not there is a valid basis for the various allegations and denials of the pleadings. It is utterly amazing how many issues are injected into a law suit by the pleadings for which there is no adequate factual foundation. A preliminary examination by the pre-trial judge of the evidence which the parties have available to support their respective claims invariably results in many so called "issues" being dropped. As the issues are narrowed the pleadings of necessity are frequently amended and simplified. The natural result is the elimination of unnecessary preparation both upon the law and the facts.

As the pre-trial conference proceeds, in an informal atmosphere where the parties may smoke if they so desire, exhibits such as photographs,

hospital records, police reports, certified copies of municipal ordinances and the like are produced, examined and discussed without regard to their ultimate competency or relevancy as evidence. Stipulations are entered which dispense with the necessity of the formal proof necessary to qualify properly the exhibit for subsequent offer. There is thus saved not only the time of the photographer, record librarian, policeman or municipal clerk, whose testimony might otherwise be needed to meet the technical requiremnt of authenticity, but also the time of the trial judge and jury who then need not take up time with such technical proof.

As the conference progresses the pre-trial judge, upon request of one of the parties, frequently indicates his views upon a particular exhibit or point of law, and on occasion a particular point of law may be researched in the judge's library. Again the time of the trial judge and jury is conserved. Herein lies one of the chief values of the pre-trial conference as it frequently makes clear to the lawyers and their clients the weakness or strength of their respective sides and affords the opportunity to the pre-trial judge to highlight such strength or weakness. It is surprising how often the conference results in a major change in the prior appraisal of the merits of a case or defense. The presence of a judge, even in the informal surroundings of a pre-trial conference, seems to encourage truthfulness and to discourage exaggeration and bombastic claims. A simple, searching question put by the judge frequently deflates any unfounded claim or tenuous defense. As a result, basic admissions often are made by one side or the other, and a realistic appraisal of the positions of the respective parties is made possible.

It is after the pre-trial conference has reached this stage — with issues narrowed, pleadings amended, admissions made and stipulations entered — that the pre-trial judge is afforded the opportunity of exploring settlement possibilities. It is in the field of settlement wherein the little hostility that does exist toward pre-trial lies. Pre-trial has been criticized as "a stalking horse" for settlement negotiations. There are those who feel that it is not the province of the courts to settle cases but only to try them.

With this criticism I heartily disagree. It always has been the sound policy of the law to discourage and not to encourage litigation, to foster and not to hinder the amicable adjustment of disputes. It is, of course, a valid criticism that occasionally too much emphasis is placed upon pre-trial as a means of effecting settlements of contested matters. But I regard this as a criticism of the individual judge conducting the hearing rather than of the conference vehicle itself. If pre-trial is regarded as a means of bludgeoning litigants into *unwanted* settlements its value as an aid to judicial administration is destroyed. The pre-trial judge never

should commence his conference with the inquiry "Can this case be settled?" Only after a full and complete hearing should the subject of settlement be approached, and then with caution. Settlement never should be the primary purpose of the conference although, as a matter of fact, if the conference is intelligently handled, frequently it will be a rewarding result. In a letter to Harry D. Nims of the New York Bar, author of *Pre-trial,* Judge Harry M. Fisher of the Circuit Court of Cook County, Illinois, wrote:

> I do not apologize for using the pre-trial conference as a vehicle for bringing about amicable settlement. I think that therein lies its chief value. It cuts across archaic rules of procedure as well as outworn concepts of the judge's function. It is not a matter of "streamlining" but one of approach. Since every lawsuit ultimately comes to an end, why not help the parties to reach that end by business-like arrangements? Settled the case will be, if not by agreement then by imposition through judicial pronunciamento, leaving one and not infrequently both of the parties dissatisfied, disgruntled and with respect for judicial process considerably shaken.

The success or failure of the pre-trial conference depends primarily upon the effectiveness of the judge who conducts the hearing. He must have a firm confidence in pre-trial as an effective arm of the judicial process. He must be willing to take the time and to make the effort necessary toward an unhurried examination of each facet of the case. He must be willing to do some original thinking about the matter before him. He must be a good student of human nature and not be misled by the sometimes overzealousness of litigant or counsel. He must be patient and must guide with firmness rather than attempt to dictate. And most important of all he must ever be alert to see that justice is fairly meted out to both parties. To do that day after day, keeping note of the progress of many cases which are continued to subsequent hearings, is perhaps far more difficult and energy consuming than are the duties enjoined upon him in the actual trial of the ordinary law suit. The task is far from being a sinecure.

While the success of the conference so largely depends upon the judge conducting the hearing, the conference cannot succeed without the full cooperation of the participating lawyers. The lawyers themselves must wholeheartedly believe in pre-trial as a means of saving time and expense for the court and the litigants. They must come to the conference fully prepared upon every feature of the case to be pre-tried from both factual and legal standpoints. They must be willing to cooperate fully in helping achieve the goal of pre-trial by waiving formal proof of technicalities, which do not go to the merits of the case, and in stipulating uncontroverted or unchallengeable facts. One of the objects of modern

civil procedure being to compel parties to civil actions to disclose to their opponents, before trial, all or some of the facts on which they intend to rely, lawyers should frankly disclose, within certain limits, the strength of their cases and should not resort to "trial by ambush." It is not suggested that full disclosure be made to the minority of lawyers or litigants who merely will use the opportunity later to change their positions or to distort their testimony, but, in the main, disclosure can be made without prejudice to the client's cause. The lawyer should encourage rather than discourage any desire on the part of his client for amicable compromise. And in all of his dealings with the court and opposing counsel his conduct should be professionally objective.

A pre-trial conference intelligently supervised and directed by the court, and participated in with sincerity by counsel, results in benefits to all concerned. By simplifying issues and evidence the actual trial time of contested cases is reduced and the time of trial judge and jury conserved. Courts find it possible to reduce the backlog of pending cases by securing settlements of contested matters that would otherwise have gone on to full trial had it not been for the offices of the pre-trial judge as an impartial mediator. Litigants benefit, for it reduces the cost and effort involved in preparing cases for trial, shortens the time of actual trial, and frequently completely avoids trial.

In the absence of a pre-trial system the trial judge ordinarily explores the possibility of settlement after the case reaches his room and before the trial is actually started. Many cases thereby are settled which already have been prepared for actual trial, with parties and witnesses waiting to testify. The statistics of the Common Pleas Court of Cuyahoga County reveal that in the year last preceding systematic pre-trial 715 cases were so settled in the trial room compared with 209 cases so settled in the year 1955. The economic saving thus effected by systematic pre-trial is clearly established. The time and expense of the lawyers in arranging for the presence of litigants and witnesses are saved. The litigants and witnesses themselves are saved the wasted time of coming to court only to have the case settled. One other benefit should not pass unnoticed. Without pre-trial a run of cases settled upon reaching the trial room results in many gaps in the trial docket, and, not infrequently, the assignment commissioner finds it impossible to keep all trial rooms occupied. The cases disposed of by the pre-trial conference method largely eliminates these gaps, because the possibilities of settlement have been explored prior to the case reaching the trial room. Pre-trial thus achieves a more economical and orderly administration of the court's business.

And what of the lawyer himself? Wherein does pre-trial benefit him? It can, of course, be argued that pre-trial works against the self-